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Supreme Court of the United States

OCTOBER TERM, 1948

No. 883 136

J. S. BUTNAM and STANLEY M. BURNS, Executors
OF THE ESTATE OF ABRAHAM BURTMAN
Petitioners

v.

THE STATE OF NEW HAMPSHIRE,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

RESPONDENT'S BRIEF
OPPOSING JURISDICTION

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RESPONDENT'S BRIEF OPPOSING JURISDICTION

Pursuant to Rule 38, Paragraph 3, Rules of the Supreme Court of the United States, comes now The State of New Hampshire, respondent, and discloses the following material in opposition to the Petition for a Writ of Certiorari, including certain objections to the jurisdiction of the Court as permitted under Rule 7, Paragraph 3 of said Rules.

ARGUMENT

Summary

The issue presented is whether the State of New Hampshire, under its inheritance tax law, may properly include a compromise payment by the executors to the testator's widow in the taxable estate. This is a matter entirely for the state courts since this Court has long held that where, as in this case, the rules of transmission and devolution of property passing as a result of death adopted by the state are reasonable and all persons subject to such rules are treated with equality under similar circumstances, no federal question is presented.

I. The method of determining the tax is a reasonable and proper regulation of the privilege of inheritance.

The New Hampshire inheritance tax statute provides that:

> "All property within the jurisdiction of the state, real or personal, and any interest therein, belonging to domiciliaries of the state, . . . which shall pass by will, or by the laws regulating intestate succession, . . . to any person, absolutely or in trust, except to or for the use of the husband, wife, father, mother, lineal descendant, or adopted child of a decedent, . . . shall be subject to a tax of eight and one-half per cent of its value, for the use of the state." Revised Laws of New Hampshire (1942), Chapter 87, section 1, as amended by Laws of 1945, chapter 144, section 1.

Section 33 of the same chapter enacts that:

> "Said tax shall be assessed upon the actual market value of the property at the time of the decedent's death, and gains or losses on sales made afterward for any purpose shall be disregarded, except as evidence of true value at time of death. Such value shall be determined by the assistant attorney general and notified by him to the person or persons by whom the tax is payable, and such determination shall be final unless the value so determined shall be reduced by proceedings as herein provided."

Paragraph 33rd of the will of the testator directs the executors "to pay all taxes . . . on the bequests and against the legatees named in the will, out of the residue of my estate . . ."

The petitioners assert that the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States are violated if they are obliged to pay a tax based on an amount larger than that actually received by the residuary legatee.

> ". . . it has been repeatedly held by this Court that the power of testamentary disposition and the privilege of inheritance are subject to state taxation and state regulation, and that regulatory taxing provisions, even though they produce inequalities in taxation, do not effect an unconstitutional taking of property, unless, . . . the taxing statute 'results in such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation,—to spoliation under the guise of exerting the power of taxing.'" *Stebbins* v. *Riley*, 268 U. S. 137, 140-141, 45 S. Ct. 424, 425, 69 L. Ed. 885, 888.

The State of New Hampshire has assessed the tax in this case according to the manner of transmission directed by the will of the testator and has refused to deduct from the taxable estate the $100,000 paid to the widow as a result of her compromise settlement with the petitioners. The Supreme Court of New Hampshire has ruled this a proper assessment. *In Re Estate Abraham Burtman*, 95 N. H. 383, 63A. 2d 798. The reasons for adopting this method of assessment rest on both legal and practical grounds. These grounds have been stated cogently in 33 Harvard Law Review, 556, 574 (Warren: The Progress of The Law, 1918 - 1919; Wills and Administration):

> "the . . . doctrine . . . which taxes the estate according to the terms of the will and not according to the provisions of the agreement, is preferable. It is true that a legatee may renounce, and if he does, the legacy is not taxable to him but to the residuary legatee; and if he may renounce in part, escape the burden and let the person who actually receives the property pay the tax. But in renunciation, as in the case of lapsed or void legacies, the law of wills or the intestate law—not the agreement of the parties—carries the property to the person taxable."

The author goes on to say that a doctrine approving taxation in accordance with compromise agreements entered into subsequent to the will "lays the foundation for collusive agreements to deprive the government of its just due." See Annotations 137 A.L.R. 665; 78 A.L.R. 716; See also *People* v. *Union Trust Co.*, 255 Ill. 168, 99 N. E. 377.

Other authorities on this question are collected and discussed in Kidder, State Inheritance Tax and Taxability of Trusts at 28, where the author comments as follows:

> "This question has been litigated in several states, and the great weight of authority holds that successions in such cases shall be taxed only in the manner as provided by the will and not in accordance with an agreement subsequently entered into among the heirs and beneficiaries. . . . to permit the heirs, legatees and parties interested in an estate to change by agreement among themselves, after the death of a testator or decedent, the proportionate amounts of the property on which the respective beneficiaries should pay an inheritance tax, might, in some instances, practically deprive the state of all power of collecting any inheritance tax; the rights of the state to the inheritance tax are fixed as of the date of death of a decedent, and those rights cannot be annulled or abridged by any subsequent agreement between the parties interested in the estate of the decedent."

A successful contest of the will would have defeated the testator's intentions and left his property to be disposed of according to the laws of intestacy, but when the will was probated his intentions therein were upheld and made certain of performance. The additional $100,000 ultimately paid to the widow in settlement was part of the property which passed by the will and the will stands as it was executed. Nor does the approval of the compromise agreement by the Strafford County Probate Court vary the case. As quoted in *Baxter* v. *Treasurer and Receiver General*, 209 Mass. 459, 462-463, 95 N. E. 854, 856:

> " 'The agreement for compromise did not become a part of the will. Although the practice is to insert a clause in the decree to the effect that the estate shall be administered in accordance with the agreement for compromise established thereby, yet the rights of the parties growing out of the agreement rests upon it and the decree confirming it, and

> are not testamentary rights' . . . For reasons hereinbefore stated the amount of the tax is not changed by the fact that the agreement was approved by the court . . ."

It is apparent therefore that the method of tax assessment adopted by the state is neither arbitrary nor unreasonable. Rather, it is formulated, in accordance with the foregoing principles of law, to satisfy the practical requirements of expeditious assessments and collection of the tax and to obstruct possible frauds upon the state.

II. The New Hampshire inheritance tax law as construed by the New Hampshire Supreme Court does not violate either the due process clause or the equal protection clause of the 14th Amendment to the Constitution of the United States.

The petitioners strongly emphasize that the tax base here employed by the state is broader than the value of the property to be distributed to the residuary legatee and that the burden of the tax falls upon that legatee. They imply that the result derived in this case by the Supreme Court of New Hampshire is inconsistent with earlier decisions of that Court and argue that denial of due process of law and inequality result from the alleged inconsistency. However, they appear not to recognize that the question now presented, being one of first impression in New Hampshire, required re-examination of the pertinent statutes and new construction thereof. They also appear to have overlooked or minimized decisions of that Court declaring legislation constitutional which is designed to prevent reductions in the taxable value of legacies or distributive shares and to defeat devices which may be used to defraud the state of inheritance taxes. *Kimball* v. *Badger*, 93 N. H. 345, 42 A. 2d 1; *Carter* v. *Craig*, 77 N. H. 200, 90 Atl. 509. No earlier New Hampshire inheritance tax case has dealt with a problem involving a redistribution of assets in the manner employed here. As the Supreme Court of New Hampshire has said in this case:

> "Here we are concerned with a voluntary re-distribution of the assets of the estate . . ." *In Re Estate Abraham Burtman*, supra, 385.

In this situation, the state argues that it is not obliged to consider the effect of such a re-distribution in computing the taxable value of the re-distributed property.

The fact that the residuary legatee did not participate in the compromise settlement is of no avail to the petitioners. The reasons for the tax base employed by the state prevail regardless of which interested parties did so participate, and under Paragraph 33rd of the testator's will all inheritance taxes are payable from the residue. No denial of due process of law results from thus basing the tax upon the value of the property passing by will, rather than upon the value of the property to be received by the residuary legatee.

> "The due process clause places no restriction on a state as to the time at which an inheritance tax shall be levied or the property valued for purposes of such tax." *Salomon* v. *State Tax Commission,* 278 U.S. 484, 490, 49 S. Ct. 192, 195, 73 L. Ed. 464, 469; *Central Hanover Bank and Trust Co.* v. *Kelly, State Tax Commissioner,* 319 U.S. 94, 63 S. Ct. 945, 87 L. Ed. 1282.

The position thus stated by this Court is strengthened when it is noted that in neither of the cited cases was there any opportunity for the parties to avoid the consequences of the tax. In a case like that at bar, adjustment of any tax inequities resulting from the compromise may be adjusted in the agreement of the parties and this possibility is recognized in the opinion of the Supreme Court of New Hampshire. *In Re Estate Abraham Burtman,* supra, 385.

Reliance is placed by the petitioners upon the statement in *Magoun* v. *Illinois Trust and Savings Bank,* 170 U.S. 283, 300, 18 S. Ct. 594, 601, 42 L. Ed. 1037, 1045 that the 14th Amendment requires that the law imposing the tax "shall operate on all alike under the same circumstances," to demonstrate that unreasonableness and inequality arise from the method of assessment used in this case. But in the *Magoun* case it was also stated, at 296, that:

> "There is therefore no precise application of the rule of reasonableness of classification and the rule of equality permits many practical inequalities. And necessarily so.

> In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."

The residuary legatee under Mr. Burtman's will has not been separately classified nor discriminated against in the present case. The State of New Hampshire has decided simply that compromise payments are within the taxable estate. Stated otherwise, the state does not allow compromise payments as an inheritance tax deduction. This Court has expressly held that the Constitution of the United States permits a state to allow deductions from its inheritance tax or not to allow them, for "such regulations, so long as they proceed within reasonable limits and general usage are within the discretion of the state legislature or the people of the state in framing their Constitution." *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237, 10 S. Ct. 533, 535, 33 L. Ed. 892, 895; *Stebbins* v. *Riley,* supra. Any burdens resulting from the decision of the Supreme Court of New Hampshire in this case falling upon the residuary legatee are entirely incidental. Compromise payments, not beneficiaries, have been classified and the petitioners' argument that the residuary legatee is being discriminated against because it is not being taxed equally with others in the same class as itself since it is required to pay a higher tax than other legatees receiving the same amount from the same size estate, must fail.

The petitioners have not properly applied the *Magoun* case test which they rely upon. The pertinent inquiry under that case is whether the residuary legatee is paying the same tax that other legatees would pay upon receiving the same amount from the same size estate "under the same circumstances."

> "The guaranty of the 14th Amendment of the equal protection of the laws is not a guaranty of equality of operation or application of state legislation upon all citizens of a state." *Stebbins* v. *Riley, supra,* 142.

Until the petitioners can show that other legatees have been or will be allowed to deduct compromise payments similar to that made in this case, they may allege no inequality and no discrimination. Any claim of discrimination resting upon any hardship incurred by the residuary legatee from the present assess-

ment is countered by Mr. Justice Brandeis in *Salomon* v. *State Tax Commission, supra,* at 491, 492:

> "To all such objections it may be answered that minor inequalities and hardships are incidents of every system of taxation and do not render the legislation obnoxious to the Federal Constitution."

III. No substantial federal question is presented in the case at bar.

It is apparent from the foregoing statements of law that the questions raised by the petitioners concerning the application of the New Hampshire inheritance tax law, as construed by the Supreme Court of New Hampshire, have been unequivocally answered by this Court several times and must now be deemed foreclosed.

> ". . . although . . . it be found that a question adequate, abstractly considered, to confer jurisdiction was raised, if it likewise appear that such question is wholly formal . . . or has been so explicitly foreclosed by a decision or decisions of this Court as to leave no room for real controversy, the motion to dismiss will prevail." *Equitable Life Assurance Society of the United States* v. *Brown,* 187 U. S. 308, 311, 23 S. Ct. 123, 125, 47 L. Ed. 190, 192; *Pennsylvania Hospital* v. *Philadelphia,* 245 U. S. 20, 38 S. Ct. 35, 62 L. Ed. 124.

Under these circumstances, this Court is bound by the construction placed upon the New Hampshire inheritance tax law by the Supreme Court of New Hampshire.

> "The subject dealt with is one of state law expounded by state courts. All the laws and the construction put upon them apply equally to all persons in a like situation and cannot be regarded as conflicting with the provisions of the Federal Constitution." *Orr* v. *Gilman,* 183 U. S. 278, 290, 22 S. Ct. 213, 218, 46 L. Ed. 196, 203; *Central Hanover Bank and Trust Co.* v. *Kelly, State Tax Commissioner, supra.* "It has never been held that it was the purpose or function of [the 14th Amendment] to change the systems and policies of the states in regard to the devolution of estates or to the extent of the taxing power over them." *Orr* v. *Gilman, supra,* 286.

It is further submitted that the petitioners did not raise a federal question seasonably. Careful study of the petitioners' brief before the New Hampshire Supreme Court upon transfer of the question does not reveal the slightest indication that any federal question was posed, nor in any federal question discussed in the Opinion of the New Hampshire Supreme Court. Such a question is suggested for the first time in the petition for rehearing, addressed to the Supreme Court of New Hampshire.

> "The long established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late unless the court actually entertains the question and decides it." *Herndon* v. *Georgia*, 295 U. S. 441, 443, 55 S. Ct. 794, 795, 79 L. Ed. 1530, 1532.

The petition for rehearing was denied without argument or opinion. The only reference to the Constitution of the United States appears in the certificate issued by the Chief Justice of the New Hampshire Supreme Court. This certificate does not cure petitioners' error in failing to raise a federal question at the time the case was heard. As Chief Justice Hughes said in *Honeyman* v. *Hanan*, 300 U. S. 14, 18-19, 57 S. Ct. 350, 352, 81 L. Ed. 476, 479:

> "Before we may undertake to review a decision of the court of a state it must appear affirmatively from the record, not only that the Federal question was presented for decision to the highest court of the state having jurisdiction but that its decision of the Federal question was necessary to the determination of the cause . . . Whether these requirements have been met is itself a Federal question. As this Court must decide whether it has jurisdiction in a particular case, this Court must determine whether a Federal question was necessarily passed upon by the state court. That determination must rest upon an examination of the record. A certificate or statement by the state court that a Federal question has been presented to it and necessarily passed upon is not controlling. While such a certificate or statement may aid this Court in the examination of the record, it cannot avail to foreclose the inquiry which it is our duty to make or to import into the record a Federal question which otherwise the record wholly fails to present."

The State submits that a federal question was not necessarily decided by the Supreme Court of New Hampshire because the well established principles heretofore stated enabled that Court to rest the decision in this case upon other than federal grounds. See, *Manhattan R. Co.* v. *City of New York*, 18 Fed. 195; *City of Louisville* v. *Cumberland Tel. and Tel. Co.*, 155 Fed. 725.

For the reasons above stated, it is respectfully submitted by the respondent State of New Hampshire that the petition for a writ of certiorari should be denied and that the writ should not issue.

Respectfully submitted,

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